Craig, R. J. T. (2018). Restoring confidence: Replacing the Fixed-term Parliaments Act 2011. *Modern Law Review*, *81*(3), 480-508.

COVER PAGE

Title: Restoring confidence: Replacing the Fixed-term Parliaments Act 2011*

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Word Count: 12,674 (not including cover sheet or footnotes)

Declaration: The material in this piece is not under consideration elsewhere, and it has not been published or is not pending publication elsewhere. There are no electronic versions of the paper on the internet.

Keywords: Fixed-term Parliaments Act, Prerogative, Statute, Abeyance principle, Frustration principle, Interpretation Act 1978, Dissolution of Parliament.

Abstract:

This article begins by considering both the Fixed-term Parliaments Act 2011 ('FTPA') and the political constitution, to place the former in its political and constitutional context. It sets out the background to the FTPA – which was a part of a Coalition agreement – and considers difficulties with the most commonly-made argument in favour of Fixed-term Parliaments.

The second part of the article then considers the impact of a bare repeal and addresses the potential practical legal consequences if the FTPA is repealed without any replacement. It then argues it will only be possible to revive the 'dissolution' prerogative if it is done with express words in a new Act. The final part of the article addresses the question of whether the prerogative *should* be revived, before arguing both that it should not and that a statutory power to call an election should be conferred on the Prime Minister subject to a vote by simple majority in the House of Commons.

* An earlier version of this paper was presented at the Oxford Public Law Discussion Group on 30 October 2017. I am grateful to the attendees for their helpful and constructive comments and to Ewan Smith for inviting me to present to the Group. The author would like to thank Gavin Phillipson, Tom Poole, Rodney Brazier, Robert Blackburn, Helene Tyrrell, Carl Gardner, Stephen Laws and the anonymous reviewers for their helpful comments on earlier drafts. The usual disclaimer applies. All websites last accessed 2 February 2018.

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Restoring confidence: Replacing the Fixed-term Parliaments Act 2011

The Conservative Party's manifesto for the June 2017 'snap' general election stated: 'We will repeal the Fixed-term Parliaments Act'.[1] This commitment was the culmination of considerable backbench disquiet over the Fixed-term Parliaments Act ('FTPA') as evidenced by the multiple attempts to repeal the Act in the 2010 Parliament. This disquiet was shared by some Labour MPs, such as Austjn Mitchell.[2] The unpopularity of the FTPA therefore means that there is every chance that a cross-party consensus to repeal the Act may be achieved at some point in the forthcoming Parliament.

This article explores both the normative arguments surrounding, and the legal implications of, any potential repeal of the FTPA. It begins by placing the Act in its political and constitutional context. In particular, it explores the concept of the 'vote of no confidence in the government' that is central to the political constitution (labelled the 'confidence doctrine' henceforth). It also examines the most common argument cited in favour of the FTPA before contemplating some hypothetical problems that could occur under the FTPA regime.

The second part of the article goes on to address the potential legal consequences if the FTPA is repealed without any replacement. It then argues that it will be possible to revive the 'dissolution' prerogative – but that this would require express words in a new Act. The final part of the article addresses the question of whether the prerogative *should* be revived, before arguing that it should not. The conclusion is that a statutory power to call an election should be conferred on the Prime Minister subject to approval by a simple majority in the House of Commons in a Motion.

POLITICAL BACKGROUND AND INITIAL CRITICISMS

Before the FTPA, the monarch could exercise her Royal Prerogative to dissolve parliament. This power was famously one of the residual prerogatives retained by the Crown. By convention, the prerogative was exercised on the advice of the Prime Minister. This advice was always followed. The previous system was flexible, with the *maximum* term for parliament being five years. The FTPA instituted a new system whereby future elections would take place exactly five years apart, unless parliament decided by a two thirds majority to have an early election or if there was a statutory vote of no confidence in the government that was not followed by a vote of confidence within 14 days. The 2015 general election was triggered by the expiry of the fixed five year term of the 2010 Parliament.

The idea of a fixed term (as opposed to a 'maximum-term') parliament for the United Kingdom legislature is a recent innovation. The standard triennial parliament mandated in the Meeting of Parliament Act 1694 was extended by the Septennial Act 1715 to a maximum of seven years. As is well known, this was limited to a maximum of five years by the Parliament Act 1911. It is commonly assumed that parliaments do not use their full term, even though three of the last seven parliaments have done so.[3]

The narrative of how the detailed threshold requirements and other rules laid down in the FTPA were determined does not reflect overly well on the participants. David Laws, a Liberal Democrat minister in the Coalition, frankly documented the horse trading and other machinations of the two parties during their negotiations.[4] After adding up the total number of Conservative and Liberal Democrat MPs, it was calculated that 55% would prevent the Tories on their own, or the Liberal Democrats combined with Labour, from calling a general election at an opportune moment to the detriment of the other partner in the Coalition.[5] On the other hand, 55% would allow the Coalition as a whole to call a general election. The percentage chosen even allowed for some by-election losses, deliberately, because the combined total would still exceed 55% even on the assumption that a series of Coalition seats would fall to the opposition in the course of the Parliament.[6]

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[1] https://www.conservatives.com/manifesto, 43.
[2] HC Deb 23 October 2014 c1089, c1091.
[3] Normally, however, Parliament is actually prorogued just before the actual, technical expiry date.
[4] David Laws, *22 Days in May*, (Biteback: 2010),183-4.
[5] *Ibid.*
[6] *Ibid.*

After this Faustian pact was publicised, there was very considerable disquiet expressed about the bill for this and other reasons by a number of parties.[7] The Government, via the Deputy Prime minister, Nick Clegg, rapidly conceded that the transparent gerrymandering had little to commend it and a two thirds requirement was instituted in the draft Bill.[8]

In addition, the issue of any potential vote of no confidence had to be addressed. Since a vote of no confidence is arguably the pivot point of the UK parliamentary system, a clause setting out the consequences of losing a formal confidence vote had to be inserted. Unfortunately, the no confidence clause seriously undermined the two thirds clause. It meant that at any time, the Lib Dems could join with Labour and others to bring about a vote of no confidence. If the polls had shown a particular point where that might have benefited the Lib Dems, there can be little doubt that such a vote could easily have been engineered. This example shows, starkly, that the theoretical purpose underpinning the two thirds requirement was severely undermined even in its first Parliament.

Equally, the FTPA was ineffective in terms of restraining the Conservative party had it really wanted to call an early general election. The reality of how it was possible to game the system was starkly revealed by the actions of Theresa May in early 2017, when she called an early election under the FTPA procedure and secured a vote in favour of doing so. An overwhelming majority of MPs supported the dissolution of Parliament (522-17) despite the opposition being 20 points behind in the opinion polls. Indeed, this example already shows how difficult it is to envisage circumstances when an opposition party could ever realistically decide to, in effect, maintain the government in power. The political optics of such a move would be, to say the least, less than ideal.

Furthermore, in the highly unlikely event that the opposition fled the battlefield, it would take no more than the laying down of a no confidence motion by a friendly backbench MP on the government's side for the voting requirement to be not two thirds but half of MPs.[9] This was described as a 'constructive vote of no confidence' in the relevant House of Commons Library Briefing.[10] In the end, political reality will always overcome legal strictures. The problem is how much damage may be caused to the systemic reputation of the political system at Westminster in the process – and for little obvious benefit.

The latest stage in the FTPA saga relates to the June 2017 election that resulted from that vote to dissolve Parliament in 2017. The Conservative party under Theresa May lost 13 seats, thus returning 317 MPs instead of 330 (the 2015 result). Despite technically winning the election by securing the most seats, it might be argued that any mandate for repealing the FTPA was somewhat diminished by the result.

KEY PROVISIONS OF THE FTPA

The main provision of the FTPA is s 1 which sets the date for the first general election after 2010 as 7 May 2015. It then stipulates that subsequent elections will be in the first Thursday in May in the fifth calendar year after the last election. Section 2 sets out the two exceptions to the general five-year term – often referred to as 'triggers' for an early general election. The first mandates a two thirds majority requirement in the House of Commons as follows:

> **2 Early parliamentary general elections**
>
> (1) An early parliamentary general election is to take place if—
> (a) the House of Commons passes a motion in the form set out in subsection (2), and
> (b) if the motion is passed on a division, the number of members who vote in favour of the motion is a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).
> (2) The form of motion for the purposes of subsection (1)(a) is—
> "That there shall be an early parliamentary general election."

[7] Described in House of Commons Briefing Paper, Number 06111, 27 April 2017, authored by Richard Kelly.
[8] See further, Lord Norton of Louth, 'The Fixed-term Parliaments Act and Votes of Confidence', *Parliamentary Affairs* (2016) 69, 3, 9.
[9] House of Commons Briefing Paper, above, n 7.
[10] See n 7, above.

Finally, sections 2(3)-2(5) put in place an alternative mechanism for calling an election. This is initiated if the government loses a vote of no confidence and the confidence of the House of Commons cannot be obtained by 'Her Majesty's Government' within 14 days. In these circumstances, a General Election will occur.

Sections 2(3)-2(5) state:

> (3) An early parliamentary general election is also to take place if—
> (a) the House of Commons passes a motion in the form set out in subsection (4), and
> (b) the period of 14 days after the day on which that motion is passed ends without the House passing a motion in the form set out in subsection (5).
> (4) The form of motion for the purposes of subsection (3)(a) is—
> "That this House has no confidence in Her Majesty's Government."
> (5) The form of motion for the purposes of subsection (3)(b) is—
> "That this House has confidence in Her Majesty's Government."

Section 3 places the royal prerogative of dissolution into abeyance by making clear that there is no residual scope outside of the FTPA for parliament to be dissolved by the Crown using its prerogative power.[11]

> **3 Dissolution of Parliament**
>
> (2) Parliament cannot otherwise be dissolved.

The FTPA also repeals s 7 of the Parliament Act (the 5five year "maximum duration") and the Septennial Act 1715 which had set the maximum at seven years.

THE FTPA AND THE POLITICAL CONSTITUTION

The United Kingdom constitution is famously political and flexible. As Griffith pointed out, the constitution is 'what happens', '[e]verything that happens is constitutional'.[12] The FTPA inherently reduces flexibility by enshrining previously political – and therefore theoretically diachronically adjustable – procedures into fixed law. As Griffith also said, 'law is not and cannot be a substitute for politics'.[13] The Act has received heavyweight academic criticism.[14] The reduction in seats for the Conservative party in the 2017 election perhaps releases some of the pressure that had been building up to repeal the FTPA immediately, but may actually increase the scrutiny the Act itself receives as its provisions could again become relevant in the unstable political environment that has persisted since the 2017 election. Analysis of the FTPA, therefore, remains of great importance.

In particular, it is possible that an alternative Government could be formed by the Labour Party in the event that Theresa May loses the confidence of the House of Commons, for example if some of her MPs break away over the issue of Brexit. The increased structural likelihood of an alternative government arises partly because, under the FTPA, if the government falls, the Prime Minister no longer has the choice of resigning *or* calling a new general election. She may only resign.[15] This means that, unintentionally, the FTPA itself has impacted on the delicate balance between executive, legislature and the public in the UK, and, thus, on a core element of the political constitution.

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[11] *Att Gen v De Keyser's Hotel* [1920] AC 508. See also Robert Craig, "Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum.", (2016) 79(6) MLR 1041, 1046. Robert Craig, 'A simple application of the frustration principle: prerogative, statute and Miller', [2017] *Public Law* November Supplementary Issue (Brexit Special Issue 2017) 25.
[12] Griffith, The political constitution, 1979 MLR 1, 19.
[13] *Ibid*, 16.
[14] Lord Norton of Louth: https://www.psa.ac.uk/insight-plus/blog/we-need-talk-about-fixed-term-parliaments-act-2011-understand-theresa-may%E2%80%99s
[15] S 2(3)(b) and s 2(4) FTPA.

This is, or should be, controversial. The imposition of legal, prescriptive, regulatory frameworks requires normative justification that must overcome the strong arguments in favour of retaining a flexible, political constitution. Flexibility itself is worth defending. Society changes, sometimes at high speed. It is suggested that one, perhaps key, element in the absence of serious constitutional ructions since 1688 is the adaptability of the political constitution. It could also be argued that the current constitution represents the distillation of many centuries of experience from the 'bottom up' rather than 'top down'.[16] This approach is normally associated with the common law but, through a broader lens, the FTPA could be said to represent what Oakeshott would describe as a 'Rationalist' approach to the political realm that he denigrates in favour of an approach that 'asserts the primacy of experience'.[17] This political, flexible, experiential approach is to be preferred to prescriptive, rationalistic, ahistorical remedies to non-existent problems of which the FTPA is an unfortunate example.

Historically, if the government fell, it had to resign or call an election. The decision as to which option is best is a matter of the purest politics. Detailed legal regulation has no place here – particularly in a supposedly political constitution. It is accepted, of course, that this argument will not convince readers who are persuaded of the merits of legal rather than political constitutionalism. The key point is that in a flexible, political constitution, attempts to lay down a regulatory framework may please legal constitutionalists, but such a framework is arguably not appropriate for the boiling political cauldron that is at the heart of the confidence doctrine. For example, in 1979, a broken Government lost a confidence vote and went to the country. The idea that the Prime Minister could resign and another person stumble on with a minority Government was not tenable, even though in theory the vote was so close it is conceivable that an alternative leader could have taken over the Labour party and formed a government by convincing one of the recalcitrant MPs to reverse their vote. Either way, the politicians should be left to sort it out – after all, 'political decisions should be taken by politicians'.[18] Tampering with the confidence doctrine, which lies at the absolute heart of parliament qua political body, arguably requires considerably more justification than has thus far been provided. The confidence doctrine is explored further below.

The fact that either of the two Coalition parties in the 2010 Parliament could have circumvented the two thirds requirement in the FTPA shows that the Act is therefore a failure even on its own terms. It does not actually fix the term of parliament. David Cameron could doubtless have called an early election and the Liberal Democrats could have combined with Labour and others, at any time, to do the same thing. This is before even mentioning the overwhelming vote in favour of an election in 2017 at a time when the opposition was trailing by 20 points in the opinion polls. If the opposition voted in favour in those circumstances, when would an opposition ever refuse to vote for an election? The Act therefore achieves the worst of both worlds. On the one hand, it can be circumvented in precisely the circumstances that it was supposed to prevent. On the other hand, the hurdles and obstacles it creates could cause real problems in the future by creating high threshold requirements that could obstruct the best outcome in unpropitious circumstances. Some general examples of difficult potential scenarios under the FTPA regime are explored below.

In short, the Act was a political compromise hatched for short term reasons and it can be no surprise that its repeal was mandated in the Conservative 2017 manifesto. The FTPA can thus be seen to have failed entirely to achieve what would appear, to any objective observer, to be its core purpose of actually fixing the parliamentary term.

Handing a competitor the starting pistol

The standard criticism of the old system, which gave a discretion to the Prime Minister to advise the monarch when to call an election, was the 'pure party political advantage' which allegedly accrued to her in terms of timing.[19] It was argued that allowing the PM to call an election at any time she wishes is like giving a 'starting pistol' to one of the competitors in a race.[20] Robert Blackburn described the

[16] See further on the idea of reasoning from 'low-level' instead of 'high-level' principles. Sunstein, 'Incompletely Theorized Agreements', *Harvard Law Review* (1995) Vol 108, 1733-1772.
[17] This distinction is well discussed in Loughlin, *Public Law and Political Theory*, (1992: OUP), 64-5.
[18] Griffith, n 12, 16.
[19] Robert Blackburn, *The Electoral System in Britain* (Macmillan: 1995), 63.
[20] Lord Holme, HL Deb., 22 May 1991, col 245.

power as a 'tremendous tactical advantage'.[21] However, this claim of an unfair political advantage for the incumbent is highly questionable, for a number of reasons.

The first difficulty for the 'political advantage' advocates is that the starting pistol analogy cuts both ways. Even if it were to be accepted that one of the competitors has been handed the starting pistol, there is every chance that when they fire the pistol they will shoot themselves in the foot, thereby rather hampering their ability to win the race. This has happened more than once. In addition to the disaster in 2017 precipitated by Theresa May's early call of a general election, Ted Heath famously called an election in 1974 to determine 'who governs Britain' and received a fairly salty answer from the electorate which threw out his Government. Gordon Brown in 2007 flirted with calling an election but was spooked by new policy announcements on inheritance tax and a subsidence in the opinion polls by the Conservative party. Had he decided to hold an early election, it could easily have gone just as badly wrong as it did in 2017 for Theresa May.

General Elections are uncontrollable and, ultimately, unpredictable. That is inevitable in a democracy. The idea that they can be called (and millions of people thereby be inconvenienced) without serious risk to the governing party is demonstrably flawed. If the 2017 election showed anything, it showed that at election time at least, the electorate are clearly watching and listening carefully (the evidence from 2017 is especially clear when the voting patterns are contrasted with those of the local elections a month previously).[22] The idea, therefore, that the ability to call a general election is an unequivocal advantage for the sitting Prime Minister is dubious at best, and simply wrong at worst.

The next, perhaps more mundane, point to make relates to the UK as a political constitution. It might be thought to be somewhat inconsistent to criticise the power to call an election for being 'political' in nature. Of course it is political. It is inherent to the very nature of the political constitution that the decision is 'political'. Everything that the government does by way of proposing bills, implementing policies and spending money is designed to affect the outcome of the next election and is therefore 'party political' in exactly the same sense. It is not immediately clear therefore why the ability to time the election is being singled out for special treatment for being 'party political'. It is arguable that the very claim of 'politicising' the decision to call an election is a cipher for attacking the concept of political constitutionalism itself. That charge is, in effect, led by those who would prefer a legal rather than political constitution. Many of these critics are, of course, lawyers of one sort or another.

A sceptic might argue that there is something different about the power to call an election, as opposed to 'ordinary' political decision-making, because that could be seen as some kind of second order issue where mere politics is not appropriate. It might be thought that determining who the government should be is in some sense qualitatively different.[23] This, again, misses the inescapably political nature of the UK system. The uncodified nature of the constitution means that such second order ideas have little meaning or place in this most political of contexts. At best, this example sits further along a spectrum of decisions as being more weighty rather than having any transcendental, separate, second order status. This point also misses the centrality and purpose of the confidence doctrine. Calling an election in a political constitution is, inescapably, political. The real beauty of the Prime Minister having the power (usually with the backing of Cabinet) is that there is immediate political accountability for the decision by virtue of a national vote. In some ways, therefore, the direct democratic accountability of the decision to call an election ought to make it the *least* controversial exercise of political power by the Prime Minister.

Furthermore, the FTPA is but one Act. It has no special or constitutional status.[24] Any government with a majority could, in the end, propose a bill to dissolve the current parliament and be pretty confident of securing support in the House of Commons (it is suggested a House of Lords refusal in such circumstances is almost inconceivable). This could have been resorted to, had the 2017 vote that achieved a two thirds majority under the FTPA not succeeded. In those circumstances, it could be argued that a new Act simply dissolving Parliament would have been the better solution rather than the Government putting forward a motion of no confidence in itself. In those circumstances,

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[21] See O. Hood Phillips, *Reform of the Constitution* (London, Chatto & Windus, 1970), 52.
[22] http://www.bbc.co.uk/news/uk-politics-39810488.
[23] My thanks to the anonymous reviewer for suggesting this point.
[24] On the constitutional status of certain Acts see *Thoburn v Sunderland City Council* [2003] QB 151 and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

even the requirement in the FTPA for a vote of no confidence could be circumvented. This rather undermines the idea that there is some political advantage that accrues to the government when the very structure of the UK system presupposes that a government with a majority could precipitate an election at any time by proposing a bill dissolving parliament and getting it through parliament. Political constitutionalism itself is arguably the real, but veiled, target of critics, not the particular power to call elections that the Prime Minister formerly possessed or can still achieve by various machinations. Debate in this context therefore has more of the feel of a phoney war on a proxy target.

It is also possible that parliament could pass an Act granting the authority to dissolve parliament to the Prime Minister. A Prime Minister with a majority could get such a bill through parliament at the beginning of the parliament, with the power to dissolve thereafter being held in reserve. These possibilities are not canvassed here as positively good ideas. They merely illustrate the fact that any super-imposed regulatory system can be gamed, ultimately, in what remains a fundamentally political constitution. In a system where a government with a majority can get its way, it seems perverse to create a system that does not achieve its stated purposes and potentially involves politicians in machinations that damage the reputation of the political system. Sir Alan Duncan MP made a very similar point when he proposed a Bill to repeal the FTPA.[25]

The scenarios above are designed to show that, *as currently constituted*, it is close to incoherent to seek to impose a fixed-term model on the fused UK parliamentary system. There is an inherent contradiction on the one hand between the flexibility and inescapable politicisation represented by the confidence doctrine alongside the structure of the political constitution where government is drawn from parliament, and on the other hand the rigidity and inflexibility of a statutory regime governing the timing of elections. The FTPA is a square peg in a round hole.

The democratic roots of the confidence doctrine

A further problem with the standard criticisms of a Prime Ministerial power to call a general election is that the FTPA undercuts perhaps the most important element of the political constitution which is the confidence doctrine. Votes of (no) confidence form, in many ways, the keystone of the constitution even though they have no legal basis. Tomkins argues that the confidence doctrine is a 'simple – and beautiful – rule' at the 'core' of the 'remarkable creation' that is the British constitution.[26] There used to be three potential outcomes following a motion of no confidence. The first is a government victory. The second is a government defeat leading to the resignation of the government and the monarch calling on the leader of the opposition to form a government. The third is a government defeat leading to the immediate calling of a general election. The FTPA cuts off the third limb of this three-legged stool.

At first glance, there might be thought to be something a little odd about a Prime Minister who has *lost* the confidence of parliament retaining the power to advise the monarch to call an election. The oddity disappears once it is understood that the basis for the Prime Minister possessing the confidence of the House is precisely because the Commons represents the democratic will of the people. Viewed through this prism, there is a choice between resigning and allowing a different government to seek to demonstrate it has the confidence of the representatives of the people or, alternatively, bypassing (entirely legitimately) the *representatives* of the people and asking the people directly for a (fully democratic) vote of confidence. As we have seen, the answer might be salty.

The important point is that the government is entitled to insist that it has the implicit confidence of the people through their representatives by succeeding against any vote of no confidence. It is, however, equally entitled to seek to demonstrate in the alternative that it has the direct and democratic confidence of the people through a general election, particularly if it loses a confidence vote in the Commons. This is an expression of the democratic roots underpinning the British constitution and is worth defending.

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[25] HC Deb 6 March 2015 c1245. 'The Fixed-term Parliaments Act, however, erects new hurdles that make it harder to dissolve Parliament midway through its term, and as a result, it is a recipe for political horse trading and coalition manoeuvrings, which, I maintain, will weaken, not strengthen public confidence in our politics and Parliament'.

[26] Tomkins, *Our Republican Constitution*, (Oxford and Portland, Oregon, 2005), 1.

This also may explain in part why there is a need for frequent elections. It is because it is important to ensure that parliament continues to represent the democratic will of the people in a reasonably up-to-date manner such that those currently claiming to have the confidence of the people through their representatives are right to continue to make that claim. General elections, and success against votes of no confidence in the House, provide governments with their democratic legitimacy and their mandate. The confidence doctrine thus forms not only the core of the political constitution but is actually fundamentally and umbilically connected to general elections and, by extension, the democratic roots of the constitution.

The FTPA is deeply antithetical to this analysis. It narrows the potential constitutional pathways to two rather than three possibilities by restricting access to the option of seeking a democratic vote of confidence from the people directly rather than from their representatives. It therefore undercuts the underlying justification for the central pillar of the political constitution because it obstructs the option of seeking a direct mandate from the people – due to the distinct possibility of not being given that mandate. It is hardly surprising, perhaps, that the FTPA has become increasingly unpopular amongst democratically elected MPs.

Potentially difficult scenarios under the FTPA regime

It is possible to construct scenarios where very serious political and constitutional difficulties could arise due to the rigidity of the FTPA. For example, the Prime Minister could lose a statutory vote of no confidence but refuse to resign immediately, claiming to be trying to secure the votes to get the required vote of confidence. This might be done in the hope of using up the 14 day statutory period and preventing any alternative government from being formed (if this is even possible – see below), purely to try to bring about a general election. The Prime Minister could argue that nothing should be done by the opposition whilst negotiations were continuing to secure a vote of confidence, particularly as the Prime Minister and her team technically remain the government under the terms of the Act. This could lead to an impasse which could even have the unwelcome and potentially constitutionally damaging effect of drawing the monarch into the political arena to resolve the situation.

Furthermore, if a vote of confidence took, say, 17 days to be achieved, then one party could claim that an election was legally required and the other party could claim that it should be allowed to govern because it secured a vote of confidence, even though it was late. In *Robinson*, an analogous question was litigated all the way to the House of Lords which held that overrunning a six week deadline could be ignored for essentially pragmatic reasons.[27] Since they would be construing the words of a statute with specific legal requirements, the courts could scarcely deny their jurisdiction. Regardless of which way a court might go if the 14 day limit were breached, the mere possibility of litigation over whether a general election must take place is extremely unwelcome not least because it would take a long time and the interim period could see serious problems of legitimacy, or even paralysis, in the running of the country.

A further problem relates to the 'vote of confidence' in s 2(5) of the FTPA. The vote of confidence (rather than the vote of no confidence) is a new constitutional invention of the FTPA. It is not entirely clear that it is a positive development in this context. The section states that if the House votes that it has confidence in Her Majesty's Government within 14 days of it losing a statutory no confidence vote, then an otherwise inevitable election is averted. If the opposition leader appears to have the numbers to form a government, must the monarch dismiss the existing government even if it claims to be still working on securing the votes to stay in office? Even worse, if both sides claim that they can form a government, the monarch could be left with no clear answer as to who to call upon as Prime Minister, particularly if the two main candidates both insist that they should be called (if, say, the governing party quickly replaces their leader). The monarch could again be drawn into the political arena. Particularly risky would be if both main parties claimed to have won a vote of confidence in the House of Commons by incentivising MPs from other parties to vote their way on a statutory vote. Some MPs could vote in favour of both slates in response to various incentives. This would be, to put it mildly, sub-optimal.

There is a further serious potential problem. In order to form a government, the opposition leader would need to be called upon by the monarch to be Prime Minister. By convention, in exercising her

[27] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

prerogative the monarch is supposed to call the person who can command the confidence of the House of Commons. But the FTPA now lays down that a formal vote of confidence is necessary to establish whether anyone can actually command the confidence of the House after a statutory vote of no confidence. It is not, therefore, clear whether the monarch can, or should, call on anyone *before* such a vote of confidence in the House. This is because the statute now lays down a procedure for determining the very question of whether someone commands the confidence of the House in a way that arguably overrides the convention in these circumstances. If she cannot therefore call for the opposition leader, it is unclear how there can be a vote of confidence 'in Her Majesty's Government' if the leader of the opposition has not been called by the monarch to form a government.[28] A 'chicken-and-egg' situation could occur.

This difficult scenario could even mean the Palace having to contact the Whips of one of the major parties to see if a vote of confidence would be won. There could even be issues over whether the monarch had acted properly in appointing a new Prime Minister if they then failed to win the statutory confidence vote, given the convention is supposed to be based on precisely that same criterion. These problems might mean that the opposition cannot legally form a new government under the FTPA procedure. If the opposition cannot legally form a new government after a vote of no confidence, then on one reading, the FTPA unintentionally waters down the effect of a vote of no confidence by giving only the *existing* government the opportunity to salvage the situation within 14 days. This is hardly satisfactory.

A further potential scenario is that the government resigns after losing a vote on an important bill where the government had made the vote an issue of confidence in circumstances that would historically have resulted in a general election. The governing party cannot continue to govern because it has lost the confidence of the House and has resigned. The opposition party cannot form a government for lack of supporting votes from those who brought down the existing government. Since there is technically no government because it has resigned, it may not be possible to have a Motion that technically and legally fulfils the statutory requirement of a vote on a Motion that states 'that this House has no confidence in Her Majesty's Government' and there may not be a sufficient majority for the two thirds condition to be satisfied, particularly if either major party thinks it would do badly in a snap election. Total paralysis could result.[29] All these unnecessary potential crises set out above would only occur because of the rigid wording of the FTPA.

In summary, the FTPA has unnecessarily and detrimentally affected the core element of the political constitution, the confidence doctrine. The Act has also created the possibility of a series of new and difficult constitutional scenarios where the previous rules were entirely understood by participants and had worked successfully for a very long time. Its political unpopularity in parliament might therefore be thought to be inevitable, particularly in the light of the effect on the confidence doctrine that is the basis of governmental democratic legitimacy. Finally, the FTPA has already failed in its apparent central purpose which is preventing a snap election being called for political reasons. It is astonishing how quickly events have seriously undermined the apparent rationale for the Act.

Overall, then, the FTPA has failed to achieve its ostensible central purpose whilst arguably causing significant damage to the core doctrine that sits at the keystone of the constitution and creating the potential for a serious constitutional crisis in a number of not very far-fetched scenarios.

REPEALING THE FTPA

Understanding the effect of repealing the FTPA requires analysis of a quiet backwater of the legal landscape which focuses on rules of construction, priority and interpretation that seldom receive the attention they perhaps deserve, particularly in the context of constitutional law.

In the course of the 2010 Parliament, there were numerous attempts to bring forward Bills to repeal the FTPA via a bare repeal. One example will suffice:

[28] I am grateful to Gavin Phillipson for raising this drafting difficulty at the Public Law Discussion Group in Oxford on 30 October 2017 (above note 1).
[29] Analogous scenarios are explored in Carl Gardner, *What a Fix-Up*, (Carl Gardner: 2017), Chapter 5.

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Repeal the Fixed-term Parliaments Act 2011.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Fixed-term Parliaments Act 2011

The Fixed-term Parliaments Act 2011 is hereby repealed.

2 Extent, commencement and short title

(1) This Act extends to England and Wales, Scotland and Northern Ireland.

(2) This Act comes into force on the day on which it is passed.

(3) This Act may be cited as the Fixed-term Parliaments Act 2011 (Repeal) Act 2014.

The abeyance principle

Before analysing what might happen on repeal, it is essential to set out what happened to the prerogative when the FTPA was originally passed. The general principle of what happens to a prerogative when a statute overlaps with it was famously addressed in *De Keyser's Royal Hotel* [1915] ('*De Keyser*').[30] Lord Atkinson said, at pp. 539-540, that:

> when . . . a statute …is passed, it abridges the Royal Prerogative [and the] prerogative power to do that thing is in abeyance.

Lord Sumner said, at p. 561:

> the Executive did not take possession under the prerogative [because] the Defence Acts had superseded it

I have described elsewhere the situation where prerogative and statute directly overlap as falling under 'the abeyance principle', to distinguish it from 'the frustration principle', which makes it unlawful for a minister to act under the prerogative in a way that is contrary to the intention of a statutory provision.[31] This raises the question of what 'abeyance' actually means in practice. It is suggested that where there is an overlap between statute and prerogative, the relevant Act simply has priority over the prerogative in the event a court case must consider both alternatives. In that sense, the abeyance principle is, in essence, simply a rule of *priority*.

There are therefore good grounds to say that, in general, a prerogative that is in abeyance will not revive at all, on repeal of the overlapping statute, without express words. The next question is whether the dissolution prerogative, in particular, can be revived even *with* express words. Gavin Phillipson thinks not. He argues in a recent article in this journal that it is 'tolerably clear' that the dissolution prerogative has been abolished - not expressly, but by 'necessary implication', as a result of s 3(2)

[30] *De Keyser Royal Hotel Limited* [1920] AC 508.
[31] See n 11, above. Also, Robert Craig, 'The Abeyance Principle and the Frustration Principle', U.K. Const. Law Blog (16th Nov 2016).

FTPA, which states: 'Parliament cannot otherwise be dissolved'.[32] Addressing Phillipson's argument involves considering surprisingly complex questions about how the rules of priority between statute and prerogative actually work and how these concepts relate to each other as well as, to an extent, what metaphysical 'space' these concepts occupy.

Effect of a bare repeal

At first glance, it might be thought that a 'bare repeal' of the FTPA would simply restore the status quo ante and future dissolutions of parliament would be given effect using the pre-existing Royal Prerogative. Indeed the numerous backbench draft bills proposed in the Commons in the 2010-2015 Parliament appear to have proceeded on this assumption. Unfortunately, the situation is not that simple and the assumption is almost certainly mistaken.[33] The reason is the Interpretation Act 1978 which poses a significant problem for the claim that a bare repeal (such as the attempted repeals in the 2010-5 Parliament) could revive the prerogative, unless there are express words purporting to do so.

The Interpretation Act 1978

Section 16 Interpretation Act 1978 states:

> 16 General savings.
>
> (1) … where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;

If the FTPA undergoes a bare repeal, it would seem that the prerogative would therefore *not* be reinstated because a bare repeal would not contain the requisite express words or intention. It would be essential, at a minimum, for there to be an explicit intention to revive the dissolution prerogative with clear words in a new statute. As we will see shortly, some argue that even this would not be enough in the particular context of the dissolution prerogative.

Section 16 is important because it specifically addresses what happens to previous law when an Act is repealed. If an Act that overlapped with a prerogative *automatically* and permanently abolished it at common law, it is difficult to see why a specific statutory provision mandating that such laws do not revive would be necessary. General rules of statutory interpretation make clear that normally statutes are supposed to *amend* the pre-existing common law position. If s 16 means that a prerogative *no longer* revives on repeal of a statute, then the opposite must have been the default common law position. This means that the original common law rule was that any old law would revive on repeal of an Act. Section 16 changed that rule.

As Gardner points out, old laws therefore no longer revive unless parliament clearly says so.[34] It is suggested that s 16 of the Interpretation Act itself reveals that those who draft Acts of Parliament are fully aware of ancient common law rules that old laws *would* revive, be they prerogative or statute.[35] This highly practical provision is entirely understandable as a mechanism to make sure that the unexpected revival of old laws was not done inadvertently. Given the fact that repeal of a later statute could otherwise, in theory, see the revival of a whole host of long forgotten laws, this rule of construction makes a great deal of practical sense.

In addition, s 16 makes clear that old laws can be revived if there are express words to that effect. This is what the majority in *Miller* perhaps meant when they stated that prerogatives can be

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[32] Phillipson, 'A dive into deep constitutional waters: Article 50, the prerogative and parliament' (2016) 79(6) *MLR* 1064, 1074.

[33] See A. Horne and R. Kelly, 'Prerogative Powers and the Fixed-term Parliaments Act' UK Const. Law Blog (19th November 2014). Last accessed 20 July 2017.

[34] Gardner, n 29 above, Chapter 7.

[35] On statutes reviving at common law see Orth, '*Blackstone's Rules on the Construction of Statutes*', in Wilfred Prest (edited) *Blackstone and his Commentaries – Biography, Law, History*, (Oxford and Portland Oregon, 2009), 80ff and s 15 of the Interpretation Act 1978.

'reinstated…depending on the construction of the statutes in question' [112]. *Miller* therefore provides further heavyweight support for the argument that prerogatives can normally be revived if that is parliament's express intention.

Laws are 'fixed'

A defined and long established prerogative like the dissolution prerogative is a discrete rule of law with ancient roots. Laws are generally, and correctly, understood to be metaphysically fixed and the prerogative is no different. 'Fixed' means that the core meaning and scope of a legal rule does not expand or contract, although it may on occasion be more clearly *defined* by a legal judgment. If a later judgment narrows or expands the scope of a rule, the original rule has not shrunk or swollen. Instead, it has been *replaced*, to that extent, by the later decision which has priority through chronology or the seniority of the relevant court. This article will argue that it follows, similarly, that in the event a statute overlapping a prerogative is repealed, the relevant prerogative would simply still be there, unchanged and fixed.

This is arguably confirmed by Lord Atkinson in *De Keyser* (@539-40):

> when such a statute…is passed, it abridges the Royal Prerogative *while it is in force*… after the statute has been passed, *and while it is in force*, the thing it empowers the Crown to do can thenceforth only be done by and under the statute (emphasis added).

The recent Supreme Court case of *Miller* can be read as confirming this approach. This quotation was partially cited above:

> If prerogative powers are curtailed by legislation, they may sometimes be reinstated by the repeal of that legislation, depending on the construction of the statutes in question [112].[36]

Two alternative views of the relationship between statute and prerogative

On one (unpersuasive) view, the prerogative is being continuously squeezed like a 'sponge' into a smaller metaphysical space over time by successive statutes, or even excised or abolished on occasion. This means that a prerogative 'moves', 'changes', 'contracts' or 'disappears' when a statute overlaps with it. If a statute is repealed, then normally the prerogative can 'enlarge' or 'broaden' again. Unfortunately, the idea of 'broadening' or 'enlarging' the prerogative on the repeal of the statute would appear to breach Lord Diplock's dictum (henceforth 'Diplock's rule') that 'it is 350 years and a Civil War too late… to broaden the prerogative'. Diplock's rule was arguably confirmed by Lord Bingham in *Bancoult* where he said:

> Over the centuries the scope of the royal prerogative has been steadily eroded, and it cannot today be enlarged. [69][37]

One way around Diplock's rule would be to say that if statute tries to 're-confer' what was formerly a prerogative power on the Crown then technically the fresh conferral would actually be a statutory power. However, this solution suffers from the problem, addressed below, that this would mean parliament is legally disabled, technically, from reviving a prerogative power.

A better view, it is suggested, is the idea that the prerogative sits *underneath* statutes like the ground underneath parliament and the statutes are like buildings sitting on top of the ground (the 'underground' theory).[38] Virtually all the ground is permanently concreted over but if a building is knocked down and the concrete foundation underneath is deliberately removed, the ground underneath is simply revealed again, *unchanged*. This would more closely reflect the idea argued for above that laws, including prerogatives, are *fixed*. This conception of the relationship avoids both the 'Diplock rule' problem as well as the problem that the reinstatement of a prerogative power might otherwise look like a statutory power when it is not.[39]

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[36] n 24, above
[37] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61.
[38] See also the approach in Bennion ed. Jones , *Statutory Interpretation* 6th edition (Butterworths: 2013), 168.
[39] For an approach that shares some similarities, see Carl Gardner, n 29 above.

Either way, the prerogative can normally be reinstated if the statute expresses a clear intention. This author prefers the latter approach because it avoids both problems highlighted above. The important point for our purposes is that, on the 'sponge' analogy, the wording of the FTPA may mean that if there was a bare repeal of the Act, there would be *no legal power* to dissolve parliament afterwards because the FTPA has actually abolished or permanently confined the dissolution prerogative.

Has the dissolution prerogative been abolished?

It will be remembered that Phillipson claims that the prerogative of dissolution was permanently abolished by the FTPA. It is worth pointing out that the statutory language does not in fact expressly abolish, or seek to abolish, the prerogative. Phillipson seeks to bolster his position by pointing out that the Explanatory Notes on this section say 'the Queen will not be able to dissolve Parliament in exercise of the prerogative'. Phillipson could also have quoted Point 16 in the Explanatory Notes which says:

> The prerogative power to dissolve Parliament before the maximum five-year period was exercised by Her Majesty, conventionally on the advice of the Prime Minister. *This prerogative power was abolished by this Act*. (Emphasis added).

It must be pointed out (in the interests of balance) that the Explanatory Notes specifically also say that the Notes 'have been prepared by the Cabinet Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament'.[40] On the other hand, as Phillipson has pointed out later, case law suggests that the courts are entitled to refer to such notes in understanding the meaning of the Act.[41]

It is at least arguable, therefore, that the FTPA did (perhaps somewhat elliptically) try to abolish the dissolution prerogative.

On the 'underground' analogy, the FTPA put the dissolution prerogative into abeyance - as a matter of *priority* – but the prerogative would remain fixed underneath the FTPA. 'Abolishing' the prerogative would be like trying to get rid of the ground underneath a building. An Act that repeals the FTPA, if correctly worded, would restore the status quo ante by simply removing the layers of law sitting above the prerogative and the prerogative would be 'reinstated' by default. On the 'sponge' analogy, the FTPA would excise that bit of sponge and it would be impossible to reinstate the prerogative.

The majority of the time, it does not matter which analogy is correct because when a statute is passed, it supersedes the prerogative, and the result is the same whichever view is preferred. This time, however, it matters because, on the 'underground' analogy, a full repeal of the FTPA, using the correct form of words, would result in the dissolution prerogative being expressly reinstated, whatever the FTPA says. On the 'sponge' analogy, the prerogative could not be reinstated by a later parliament.

The sovereignty problem

If Phillipson is right that the dissolution prerogative has been abolished, not simply superseded, his position must be that a later parliament is *unable to legislate* so as to fully repeal the FTPA in a way that would revive the dissolution prerogative, even if it expressly wished to do so. This is a problem because the earlier parliament would have successfully prevented a later parliament from legislating in a particular way in the future. This would mean that the earlier parliament had successfully *bound* the later parliament as to what legislation it could pass.

One of the cardinal rules of the doctrine of parliamentary sovereignty is that an earlier parliament cannot permanently bind future parliaments. This would appear to breach that rule. Phillipson understandably claims that the opposite view has an analogous problem which is that there is

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[40] http://www.legislation.gov.uk/ukpga/2011/14/notes/contents.

[41] *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, [5], per Lord Steyn. Phillipson's point was made at a debate on the FTPA with Carl Gardner hosted by the Constitution Unit at UCL: https://constitution-unit.com/2017/06/01/re-assessing-the-not-so-fixed-term-parliaments-act/.See also the House of Commons briefing document, supra n 7, 14-15.

something a *current* Parliament cannot legislate to achieve which is permanently to abolish a prerogative.[42] It could be argued, therefore, that on either view, parliament would be limited. This dilemma arguably reflects the dichotomy proposed by HLA Hart that the sovereignty of parliament must be seen as either *continuing* or *self-embracing.*[43]On the continuing view, parliament can do anything except bind itself. On the self-embracing view, it can bind future parliaments.

It might be useful in considering the applicability of this dichotomy to dwell on the concept of parliamentary sovereignty itself. It is commonly thought that parliament can do anything.[44] This is mistaken. Parliament cannot, for example, resurrect Socrates or render the earth flat. Dicey famously claimed that parliament can 'make or unmake any law'.[45] This is correct, except that it might be better phrased as being that parliament can make or unmake any *statute*. Parliament cannot create common law. Nor can parliament create a new prerogative. Of course this does not affect the power of parliament to insert whatever *content* it wishes into a statute and it will always be obeyed by the courts. It will be obeyed because parliament won the Civil War. Furthermore, it is possible to recharacterise parliamentary sovereignty as a rule of priority in the same way as the abeyance principle set out above. In the event of a conflict between common law and statute, statute must always prevail. At the most prosaic level that is what parliamentary sovereignty means, when considered from the English courts' point of view. It is simply a rule of priority.

These attempts to sharpen the definition of what parliament can strictly, legally, do are relevant to whether parliament can actually abolish a prerogative. The first point to make is that to assert that parliament could create common law or create a new prerogative would be a *category error*. Parliament can only make, or unmake, *statutes*. The more contentious claim, perhaps, is that the legal fact that parliament cannot *create* prerogative or common law actually demonstrates that it cannot permanently *abolish* them either. Incidentally, this would seem to vindicate the 'underground' theory as opposed to the 'sponge' theory. In other words, it is just as much of a category error to treat prerogatives and common law as if they were statutes that can be 'repealed' by parliament as it is to argue parliament could *create* prerogatives. It makes no sense to try to 'repeal' a court decision and it makes no sense to try to 'appeal' a statute. It is therefore a category error to admit that parliament cannot create a prerogative or appeal a court decision but at the same time claim it has the power to abolish a prerogative or abolish a common law decision. Parliament's sovereignty is not limited by this because it can achieve any policy goal it desires by passing a statute. That statute would put any prerogative or common law rule into abeyance for as long as the statute remained on the books.

If the above is accepted, this throws Phillipson's claim that a later parliament cannot revive the dissolution prerogative into sharp relief. He claims that parliament can permanently abolish the dissolution prerogative. He might contrast my claim that parliament *cannot* permanently abolish the prerogative with the claim that parliament can permanently destroy a statute, especially when the latter norm is supposed to be legally 'superior' to prerogative. Of course, a later parliament can also revive repealed statutes expressly, so the claim that parliament can permanently 'destroy' a statute may also be treated with some scepticism.[46] If it is in fact accepted that 'repealing' a prerogative would be a simple category error, then Phillipson is inevitably committed to the far less palatable claim as follows: 'Parliament must be able to pass a statute that overrides the dissolution prerogative and which cannot be entirely repealed or reversed by a later Parliament'. This is inescapably the self-embracing view of sovereignty which has received fairly short shrift in the classic English cases.[47]

Incidentally, similar arguments are raised where parliament purports to abolish common law rights, for example in the War Damages Act 1965.[48] The long title states:

> An Act to abolish rights at common law to compensation in respect of … destruction of property effected by…the Crown during…war.

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[42] He made this claim at both events cited at n 41 and n 28.
[43] HLA Hart, *The Concept of Law*, (1961: Oxford, OUP), 149-50.
[44] 'The concept of Parliamentary sovereignty which has been fundamental to the constitution of England and Wales since the 17th century …means that Parliament can do anything'. Per Lady Hale, *Jackson v Att Gen* [2005] UKHL 56, [159].
[45] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (8th edition, 1915), 2-3.
[46] See s 15 Interpretation Act 1978.
[47] See, for example, *Ellen Street Estates, Limited v Minister of Health* [1934] 1 K.B. 590 .
[48] I am grateful to the anonymous reviewer for suggesting this example.

It will be noted immediately that this Act is far more explicit than the FTPA. However, the legal principles are not affected. If a later parliament wished to revive a common law right to compensation for destruction of property by war, then it can simply repeal the War Damages Act 1965 and expressly revive the common law position. To deny this is to commit to the self-embracing theory.

It might usefully be reiterated that the FTPA itself did not seek to abolish the prerogative on its face, which may also add grist to the mill of the claim that to attempt to do so would have been a category error of which the draftsmen may have been instinctively aware.[49] It might also be pointed out that if Phillipson's argument is correct, he is committed to the view that the courts would refuse to implement a statute that purported to revive the prerogative expressly. This would look suspiciously like the court striking down a statute and remitting the matter back to parliament to try again, but, instead, presumably parliament would be instructed that it must create a *statutory* power for the monarch to dissolve parliament. This outcome seems implausible, at many levels.

There are therefore two views of what the FTPA actually intended. If, on its true construction, the FTPA genuinely attempted to abolish the dissolution prerogative, a repeal of the FTPA will reverse that attempted abolition as long as there are express words to that effect. If, on its true construction, the FTPA did not attempt to abolish the dissolution prerogative then the repealing Act, with express words of revival, would simply clear the ground for the prerogative to be exercised again. On either view, the prerogative, however, would not 'broaden' or 'enlarge'. Diplock's rule would not be breached. Instead, the dissolution prerogative will simply become available for use again, unchanged. Either way, the prerogative can be reinstated by parliament if it wishes, as the highest court has suggested is feasible in both *De Keyser* and *Miller*.

REPLACING THE FTPA

This section addresses the separate question of what *should* replace the FTPA if the Government proposes a Bill that would repeal the FTPA.

Should the prerogative be reinstated?

The surprisingly deep constitutional question of whether the prerogative *could* be reinstated is entirely separate to whether it *should* be reinstated. This article suggests that it should not. Instead, a statutory power to call a General Election should be conferred on the Prime Minister subject to one restriction. This suggestion is based on the potential difficulties that could occur if the prerogative is expressly revived. It is also designed to replicate the old system as far as possible as that is what the Conservative manifesto appears to want to achieve.

As stated in previous sections, a major problem with attempting to revive the prerogative is that Phillipson might be right that the dissolution prerogative has been abolished and cannot be revived, even expressly.[50] If Phillipson is right that the prerogative cannot be revived, it would raise the unwelcome prospect that a future Prime Minister might be faced with litigation claiming that the Crown has no power to effect a purported dissolution. A declaration could be pre-emptively sought, as in *Miller*, long before any actual attempt to dissolve parliament. As *Miller* showed, prerogatives that would normally be non-justiciable can be litigated if the claim is that there is *no power* available, rather than the exercise itself was somehow flawed. The possibility of litigation cannot be immediately ruled out, particularly after *Miller*.[51] This is one argument against bare repeal.

The second issue is the necessity for express words for the prerogative to be revived which would require a proper Bill. It will also be necessary either to insert a direct five-year limit on Parliament or expressly revive the Septennial Act 1715 and s 7 of the Parliament Act 1911. This is because those two Acts, respectively, established the maximum parliamentary term as seven years, and then reduced it to five. Both these provisions were expressly repealed in the Schedule to the FTPA (set out

[49] I am grateful to Ian Roxan for suggesting this point to me in conversation.
[50] Phillipson, n 32, above.
[51] *Miller*, n 24, above.

above). In addition, the sections in the FTPA preserving the necessary proclamations on dissolution would also probably need to be replicated.

A bare repeal would fail to revive the prerogative, might leave the status of the proclamation powers in some doubt and would mean the five year term limit of parliament would no longer be a legal rule but would be reduced to some kind of constitutional convention. This would be less than ideal, but is what would have happened if the 'bare repeal' bill cited earlier had passed.

The Queen's residual power if the prerogative is revived

A third issue relates to the controversial prerogative power of the monarch to refuse dissolution. That power went into abeyance on the passing of the FTPA, to the extent that it still remained. Carl Gardner gives a good account of the problems that could arise if the prerogative is revived.[52] He points out that long-standing debates between Robert Blackburn, Rodney Brazier et al as to when the monarch might retain a discretion to refuse dissolution, in some circumstances, would suddenly be relevant again. The issue previously burst into the public domain in the 1950s in a famous letter sent anonymously - most likely by Sir Alan Lascelles, the King's private secretary – to the Times (self-titled as 'Senex').[53] The letter claimed that where a parliament was 'vital, viable and capable', a request for dissolution could be refused, if it would harm the economy or if an alternative government could be formed.

Brazier argues that a residual power for the monarch is appropriate in some circumstances. He takes issue with Blackburn's characterisation of his position as permitting too many opportunities for royal intervention, but even on Brazier's restricted and "last-resort" approach, there remain legitimate concerns. Brazier's view reflects a commonly held assumption that the very fact that the Queen is the head of state exerts a positive effect on politicians' behaviour. Brazier claims that the monarch's prerogative to 'advise, to encourage, and to warn' ministers is 'routinely exercised and… generally welcomed by Ministers, so that the Sovereign may have a marginal but beneficial influence on government decisions'.[54]

Lord Norton of Louth points out that John Major sent a tentative enquiry to the Palace in 1993 to check that dissolution would be granted before using the threat of an election to try to bring recalcitrant backbenchers to heel.[55] He was told it would be. Commentators suggest that the pressure to prevent the involvement of the Monarch under any circumstances exerts a strongly normative influence. Unfortunately, it is difficult to see how this argument is stronger than when there was no residual discretion at all. Politicians would still have to resolve an impasse somehow. It may even be the case that removing residual discretion would *strengthen* the likelihood that a solution be found.

More disturbing is the latent possibility that defenders of a residual discretion do in fact think that, *in extremis,* a monarch could and should exercise such residual discretion. Blackburn argues, persuasively, that 'Senex' was wrong and dissolution must be granted in virtually all circumstances.[56] Even Blackburn, perhaps surprisingly, concedes, however, that if an 'unconstitutional' request for dissolution was made, it could be refused by the Queen. He suggests the example of an election that is sought following a defeat after the first Queen's speech directly after an election. He says in that situation, a request for dissolution could properly be refused.

This article disagrees with Blackburn on this point, and more generally with those who would defend a residual discretionary power *in extremis*. It is not acceptable, in a modern democracy, for there to be any circumstance where a hereditary monarch could be drawn into the political arena. This is true for those in favour of the constitutional monarchy as well as those arguing for a formal republic. For the former, there are no circumstances where the Queen should potentially be placed in a politically embarrassing situation. For the latter, the possibility of the Queen ever being personally involved would be simply unacceptable.

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[52] Gardner, n 29 above.
[53] This is well discussed by Vernon Bogdanor, *The Monarchy and the Constitution*, (Clarendon Press: 1995), 158.
[54] Rodney Brazier, *Constitutional Practice, The Foundations of British Government*', (OUP 3rd ed: 1999), 185.
[55] Lord Norton, n 6, above, 5.
[56] Robert Blackburn, 'Monarchy and the personal prerogatives', [2004] *Public Law* 546, 556.

Brazier suggests that the monarch should still be kept in reserve, 'and rightly so, for no one can foresee every constitutional twist and turn'.[57] This idea is superficially attractive. It always seems sensible to keep flexibility and 'reserve' powers precisely because it is impossible to predict all future scenarios. The argument is, however, problematic. The main difficulty is that the only scenarios in which the monarch's reserve power could be deployed are precisely when the political circumstances are so extreme that they cannot be resolved by usual methods. These would be extremely treacherous and choppy waters. So, by way of example, in 2031, only one heartbeat might separate a teenager, Prince George, from the throne. The idea that such a neophyte -- however well-meaning and armed with the best advice from his Private Secretary – could 'call in' party leaders potentially three times his age only needs to be postulated to be discarded as a possibility in the modern world. The potential political fall-out could cause very real – possibly terminal – damage to the institution of the monarchy if such a reserve power was ever deployed in reality – as the commonwealth examples discussed below perhaps illustrate.

In addition, royal involvement would also breach Bagehot's famous distinction between the dignified and efficient parts of the constitution.[58] The role of the monarch is quintessentially dignified and unless it remains that way at all times, the justification for retention of a nominal titular role collapses. The problem for defenders of residual royal reserve powers is that either it adds nothing because it could never be used, or it adds something but that something breaches Bagehot's principle and, thus, it is virtually impossible to see how it could be exercised without fatally wounding the institution of the monarchy itself.

Problematic scenarios if the prerogative is revived

There are numerous examples from the commonwealth where very considerable damage was done to unelected Governor-Generals at various times by just these kinds of scenarios. Famously, in Canada in 1926, Lord Byng refused to follow the advice of the Prime Minister, Mackenzie King, to call an election in a Hung Parliament and invited the leader of the opposition, Arthur Meighen, to form a minority government.[59] Subsequently, the new Government lost a vote of confidence by one vote. The ensuing general election saw much unfavourable political discussion of the Governor-General's actions. Governor-Generals can be replaced. The monarch cannot.

Another example occurred in 1975 in Australia where deadlock on supply led the Governor-General, Sir John Kerr, to dismiss the Prime Minister, Gough Whitlam, without notice. He then appointed Malcolm Fraser, the leader of the opposition on the understanding that an immediate dissolution would be requested and granted. The Governor-General was subjected to intense and sustained criticism for his intervention which was plainly not done on the advice of the Prime Minister. This was despite the fact that the opposition secured a substantial majority in the election which might normally have been expected to vindicate the Governor-General's actions. The fact that the election result did not ex post facto lead to exoneration of the Governor-General ought to be taken as a significant warning, it is suggested, precisely because the criticism seems inescapably to have centred on the principle of intervening at all.[60]

It might be thought that the irreplaceability of the monarch makes it substantially less likely that a similar scenario to the commonwealth examples would arise. Ken Clarke's memoirs, however, reveal that the Queen regretted granting a dissolution to Heath in 1974.[61] This implies that she felt she had sufficient soft power behind the scenes to have prevented that election. In addition, it is well known that the Queen was personally drawn into the selection of the new Prime Minister in 1963, in the absence of a formal leadership selection procedure in the Conservative party. Furthermore, even the

[57] Rodney Brazier, '"Monarchy and the personal prerogatives": a personal response to Professor Blackburn', [2005] *Public Law*, 45, 46.
[58] Bagehot, *The English Constitution* (1873), 2nd edition, 44.
[59] For a detailed narrative, see Edward McWhinney, *The Governor General and the Prime Ministers, The Making and Unmaking of Governments* (Ronsdale Press: 2005), 57-61.
[60] David Butler, 'The Australian crisis of 1975', *Parliamentary Affairs* (1976) 29(2) 201. A neat summary of the events by Loveland can be found in Ian Loveland, *Constitutional Law, Administrative Law and Human Rights* (5th edn, OUP: 2009), 284-5.
[61] Ken Clarke, *Kind of Blue, A Political Memoir*, (Macmillan: 2016), 312.

briefest perusal of the saga around the 1911 Parliament Act reveals that the then-King was moved either to threaten, or insist, on dissolution no less than three times.[62]

One hypothetical example may also help to illustrate the possibility of serious problems for the monarch under the pre-FTPA system. We start by assuming the repeal of the FTPA (in 2018, say) and the revival of a prerogative power of the monarch to dissolve parliament. Imagine, for the sake of argument, that the negotiations with the EU become very difficult indeed. Two factions from the main parties break off and form a new party, joined by the Liberal Democrats.[63] Led by the former Chancellor of the Exchequer, their platform is membership of the Single Market and Customs Union with free movement of workers, not people. The new party wishes to avoid an election because of the delicate stage of the negotiations, but they have a large majority of MPs. After losing a vote of no confidence when the new party votes against the existing government, the Prime Minister insists that she is able to advise the Queen to call a fresh election immediately. The leader of the new party claims the right as the person who now clearly commands a large majority of the Commons, to advise the monarch *not* to call an election. Whatever the Queen did, she would be heavily politically criticised by the disappointed side.

When these actual or potential UK examples are combined with the seriously complicated potential scenarios canvassed above in the event of a Hung Parliament, it is suggested that the only reason that there has not been a genuine crisis, as in the commonwealth examples, simply the greatest of good fortune. This is not sustainable. Two alternatives must be faced squarely. The first is that, at best, any residual reserve power to intervene would now be so impossible to exercise that it could never, in effect, be used. In those circumstances, there is no point in reviving the power.

The second, much less palatable, alternative is that a residual power would remain but that it would almost certainly cause a monumental constitutional crisis if it were ever used. Those who would defend the previous structure as a dignified part of the constitution must count the country as very fortunate that no actual crisis has yet occurred, and work to prevent one ever occurring in the future. These are the primary reasons that the idea of reviving the prerogative must be rejected. These are also the reasons why this author disagrees with Gardner that the prerogative should be revived.[64] A solution that keeps the Queen out of any possible political involvement must be found, and one is suggested in the next section.

Dissolution of parliament should be a statutory power conferred on the Prime Minister

One of the key strengths of the UK constitution is its flexibility, particularly in the Commons' cauldron. The FTPA is antithetical to that approach, because it introduces rgidity. It is clear that the Conservative manifesto, and perhaps the Commons more generally, wishes to return to something similar to the previous flexible system so that, effectively, the decision rests in the hands of the person who commands the *political* confidence of the elected chamber, i.e. the Prime Minister. The UK constitution tends towards flexible options over rigid options and the FTPA arguably runs counter to that. In some ways, therefore, it might be thought unsurprising that the FTPA has been marked for repeal. This section will argue that the right way forward would be to confer a simple statutory power on the Prime Minister to seek a dissolution.

Regardless of the merits or otherwise of the FTPA, the question is what should now replace it if it is one day repealed, either pursuant to the 2017 Conservative manifesto or at the behest of a subsequent **p**arliament. It is suggested that the appropriate solution should respect two central principles;

1) There should be no circumstances where the monarch could be drawn into the political arena.
2) Whatever framework is established should prioritise political flexibility over legal rigidity.

Two possible solutions

[62] Herbert Evatt, *The King and His Dominion Governors*, (OUP: 1936), Chapter IX and particularly, 88.
[63] Potential party names include 'The Independent Party', 'The Unionist Party' or, for historical aficionados, 'The Whig Party'.
[64] Gardner, n 29 above.

One solution might be to undertake a bare repeal of the FTPA in the knowledge that the prerogative would not revive without express words. Alternatively, the repeal could be deliberately drafted to ensure the prerogative did not revive. This would mean that if an early election was called, it would always require a fresh Act of Parliament approved by both Houses.

However, the solution of requiring an Act each time an early election is sought also suffers from an analogous democratic deficit as the prerogative, which is that it is possible to envisage circumstances in which the House of Lords could refuse to pass the Bill. A delay under the Parliament Act procedure, would also be very controversial as an unelected House would be preventing the testing of the democratic will of the people. This kind of intervention by the Lords would be democratically unacceptable to many people, although less egregious than a potential royal refusal.

Some may argue that having a constitutional 'long-stop' in the House of Lords would be a good safeguard, and would therefore support the requirement of a fresh Act each time an early election is called. However, there is something unpalatable about the idea of an unelected chamber stopping a General Election under any circumstances and this author cannot see how this could ever really be justifiable. If there were a refusal, there would be an immediate and serious constitutional crisis. It might even result in a threat to flood the Lords with new peers. It is difficult to see how such a refusal could end other than badly both for the Lords and the constitution more generally.

An alternative solution might be an express revival of the prerogative accompanied by the institution of a convention which required a successful Motion in parliament before dissolution could be sought. This would prevent the monarch ever being involved because any dissolution request would have Commons approval. This convention was first suggested by the Brown Government.[65] The problem with it is similar to the issues raised earlier – the convention could work precisely up to the point where it did not work. This could leave the intervention of the monarch as an undesirable possibility.

A better solution

The author's rejection of the previous two possible solutions, however, shows the way to an alternative answer. Since a Prime Minister with a healthy majority could be fairly sure of securing passage of a bill dissolving parliament in almost all circumstances, it might be better to confer a general statutory power on Prime Ministers. This would be exercised at their discretion to seek a statutory dissolution from a monarch who has no discretion to refuse. A good example of when the power would be exercised would be in the event that the Government lost a confidence vote in the Commons.

A vote in the House of Commons should also be required

The suggested delegated power to dissolve parliament would still leave the difficult scenario, postulated by Blackburn and others, in which a fresh election very shortly after the previous one, and in unusual circumstances, could cause constitutional and political problems.[66] If an untrammelled power were conferred on the Prime Minister, a 'rogue' Prime Minister could theoretically have parliament dissolved again straight after a general election. A solution is needed to replace the previous, inappropriate, residual royal long-stop for this admittedly highly unlikely scenario. In accordance with the two principles of 1) royal non-involvement and 2) flexible solutions are preferable, the right solution should be as politically flexible as possible by ideally being approved by elected politicians.

A proviso should be inserted into the new Act that, before a dissolution can occur, a vote by simple majority on a Motion in the House of Commons would be required. The Motion should be that 'this House believes that parliament should be immediately dissolved'. The justification for this is because of the legal inexorability of a dissolution once it is triggered. This rigid legal fact needs to be softened by political flexibility and approval. This would also be consistent with the UK system as a political constitution and, thus, the final decision would ultimately be political. This would also have the merit of

[65] The Governance of Britain Green Paper, Research Paper 07/72, 26 October 2007.
[66] Blackburn, n 56 above.

bringing the UK in line with many other countries that require simple or absolute majority approval by the legislature, as Robert Hazell has pointed out.[67]

The other consequence would be to restore the political primacy of no confidence motions because they would be distinct from a dissolution motion. The consequences of losing a no confidence motion would be political, as they should be, but the situation would be governed by convention, not rigid law. The loss of a no confidence motion might well lead the PM to call an election and put forward a dissolution motion but that is a matter for the politicians, not inflexible legal rules.

This new system would not prevent a Prime Minister with a healthy majority from calling a snap election, on the steps of No. 10 if desired, confident that they would win the vote in the Commons. After the vote, the Prime Minister could go to the Palace and seek the dissolution, which would still be granted by the monarch, except via a statutory power not a prerogative power. It could be modelled on the Scotland Act 1998 provisions concerning the appointment of the First Minister.[68] It would be a formality, obviously, given dissolution would have been approved by the House of Commons.

To be clear, the Queen acceding to the request would *not* be doing so by virtue of any exercise of prerogative power, in the same way that Her Majesty appointing the First Minister by definition cannot be a prerogative because the post of First Minister has been invented by statute, and (as Dicey said) prerogatives are *residual*.[69] The statutory dissolution power would have nothing to do with the old prerogative equivalent. This would not be a revival and the dissolution prerogative would remain in abeyance. Parliament can confer any power it likes on anyone. In this case, it would be conferring a genuine statutory power to seek dissolution after Commons approval on the Prime Minister and imposing a technical statutory duty to dissolve parliament on the monarch. The Queen would obviously have no discretion to refuse a dissolution request under any circumstances.

In the event that a sitting Prime Minister tried to call a fresh election immediately following a general election, they would not be assured of a victory in the vote to approve a dissolution in the House of Commons, particularly if there were a wafer thin majority or a minority government. If the Commons voted against a fresh election, the governing party would have to carry on, either with the same Prime Minister or a replacement. On the other hand, if the Commons *did* vote for another election immediately then that would have been endorsed by the elected Chamber and would then take place.

If the incumbent Prime Minister has resigned so there is technically no Prime Minister in post, and the Commons votes for a dissolution motion, the deputy Prime Minister or leader of the opposition could formally be called by the monarch in order to exercise the statutory power to seek a dissolution. A general election would be inevitable due to the vote in the Commons for an immediate General Election. None of these scenarios requires any substantive involvement by the monarch in the political process.

The proposals in this article are explicitly designed to replicate the previous system as far as possible, after adjusting for the removal of any residual discretion from the monarch. Since reverting to something close to the previous system is what the technically victorious Conservative manifesto appears to be aiming to achieve, this piece is simply an attempt to show how that goal could be achieved sensibly in the light of the two principles set out earlier.

CONCLUSION

This article has challenged the place of a rigid fixed-term system in a political constitution (with the confidence doctrine at its heart). It has been suggested that reviving the dissolution prerogative, while entirely legally possible, is not appropriate for democratic and other reasons. Furthermore, a bill will anyway be necessary to repeal the FTPA. Such a bill will need to lay down a five-year term limit for parliament as well as replicate some of its other provisions, for example on proclamations. If, therefore, the FTPA is to be repealed and a bill is then necessary, it would be better to create a statutory delegated power vested in the Prime Minister to seek a dissolution of parliament. This is

[67] R. Hazell, 'Is the Fixed-term Parliaments Act a Dead Letter?', U.K. Const. L. Blog (26th Apr 2017). Last accessed, 20 July 2017.
[68] S 45 Scotland Act 1998.
[69] A.V. Dicey, *Introduction to the Study of the Constitution* (1885; 10th edn 1959, London: MacMillan & Co.), 424.

aimed at giving the power to call elections to the Prime Minister, which would appear to be what the Conservative manifesto seeks to achieve, as well as being the probable optimal long term solution. It has been argued, however, that approval via a Motion in the House of Commons should be required before dissolution could legally be sought in order to prevent difficulties in some, admittedly unlikely, scenarios, such as an attempt to call another election immediately after one has already taken place. This would also have the benefit of putting the final decision on calling an election in the hands of the Commons.